No. 17-130

IN THE

Supreme Court of the United States

RAYMOND J. LUCIA
AND RAYMOND J. LUCIA COMPANIES, INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are "Officers of the United States" under the Appointments Clause.

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a good deal of its resources to promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often engages in original and *amicus* litigation to prevent the accumulation of power in any one governmental branch in violation of the Constitution's careful separation of powers. *See, e.g., Gordon v. CFPB*, *cert. denied*, 137 S. Ct. 2291 (2017); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929 (2017); *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010).

WLF has long criticized the Securities and Exchange Commission's (SEC) growing tendency to enforce federal securities laws before its own administrative law judges (ALJs) rather than Article III judges. Recent experience shows that the SEC nearly always prevails in its own in-house proceedings but is far less successful when it litigates in federal court. Given the significant federal authority the SEC's ALJs exercise in adjudicating complex and novel securities cases, WLF believes it is imperative that their appointment comport with the Appointments Clause of Article II, Section 2, which provides a vital check on runaway

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[1] Under Supreme Court Rule 37.6, WLF states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs.

agency overreach in our constitutional system.

WLF takes no position on whether petitioners' conduct violated federal securities laws. Instead, it is filing this brief solely for the purpose of addressing the important constitutional issues raised by the question presented. Given the Appointment Clause defect at issue, WLF is concerned that if such Article II violations have no consequence because Executive Branch agencies may simply "ratify" *ultra vires* acts by improperly appointed agents, there will be little incentive to comply with the Appointments Clause in the future.

STATEMENT OF THE CASE

The relevant facts are set out in more detail in petitioners' brief. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

The Administrative Procedure Act (APA) authorizes executive agencies such as the SEC to conduct administrative proceedings before an ALJ. Under 5 U.S.C. § 3105, "[e]ach agency shall appoint as many [ALJs] as are necessary for proceedings" where the applicable statute requires an adjudication on the record after an opportunity for a hearing. *See* 5 U.S.C. §§ 553, 556, & 557.

The SEC's relevant Rule of Practice, 17 C.F.R. § 201.110, provides that the SEC "shall" preside over all administrative proceedings either by the Commissioners' handling the matter themselves or by delegating the case to an ALJ. When the SEC selects an ALJ to preside over an administrative

proceeding—as the SEC did here—the Chief Administrative Law Judge makes that selection, subject to approval by the SEC's Office of Human Resources. Pet. App. 295a-297a; 17 C.F.R. § 201.110.

In its capacity as a hearing officer in an SEC enforcement proceeding, an ALJ "shall have the authority to do all things necessary and appropriate to discharge his or her duties." 17 C.F.R. § 201.111. Among those powers, the ALJ may administer oaths and affirmations; issue, revoke, quash, or modify subpoenas; receive and rule on the admission of relevant evidence; regulate the course of a proceeding and the conduct of the parties and counsel; and rule upon "all procedural and other motions." *See* 17 C.F.R.§ 201.111(a)-(d), & (h).

Once selected, the ALJ then presides over the matter, which includes an evidentiary hearing, and issues a decision. 17 C.F.R. § 201.360(a)(1). If no appeal follows and the SEC declines to review the ALJ's decision, that decision is "deemed the action of the Commission," 15 U.S.C. § 78d-1(c), and the SEC issues an order finalizing the ALJ's decision, 17 C.F.R. § 201.360(d)(2). Any party aggrieved by a final order of the SEC may petition a federal court of appeals for judicial review of that order.

Petitioners are formerly registered investment advisers who marketed a wealth-management strategy for retirement investors. Pet. App. 38a-41a. The SEC began administrative proceedings against petitioners and charged them with violating the Securities Exchange Act, the Investment Advisers Act, and the Investment Company Act. *Id.* at 238a. The SEC assigned the proceeding to ALJ Cameron

Elliot, who—during a nine-day hearing—presided over witness testimony, admitted documentary evidence, and ruled on objections. *Id.* at 116a. Following the hearing, the ALJ first determined that petitioners had fraudulently misrepresented one of their investment strategies. *Id.* at 117a.

After making supplemental factual findings about other alleged misrepresentations, the ALJ revised its decision to include a finding that petitioners willfully misled investors in violation of the Investment Adviser's Act. Pet. App. 195a-225a. The ALJ also imposed many sanctions on petitioners, including a revocation of their registrations as investment advisers, an injunction against future violations of the law, and $300,000 in civil penalties. *Id.* at 225a-235a.

The SEC confirmed the ALJ's factual findings and mostly affirmed—"with limited exceptions"—the ALJ's imposed sanctions. *Id.* at 66a-107a. Petitioners argued on appeal that the administrative proceedings against them were constitutionally infirm because the SEC's ALJ was an "Officer of the United States" who was never appointed under the Appointments Clause "by the President, the head of a department, or a court of law." Pet. App. 86a-87a. In rejecting that argument, the SEC held that its ALJs were employees, not executive officers, because they do not exercise "significant authority independent of the SEC's supervision." Pet. App. 88a.

Petitioners appealed the SEC's order to the court of appeals, which denied the petition for review. Pet. App. 3a-36a. Rejecting petitioners'

Appointments Clause challenge, the appeals court agreed with the SEC that its ALJs are employees who "do not exercise significant authority pursuant to the laws of the United States." *Id.* at 11a. Relying on its prior decision in *Landry v. FDIC*, 204 F.3d 1125, 113-34 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 924 (2000), which upheld the validity of the Federal Deposit Insurance Corporation's (FDIC) ALJs against a similar challenge, the appeals court held that decisions of the SEC's ALJs are similarly non-final and thus not authoritative enough to constitute an action of the SEC. *Id.* at 12a-19a.

The appeals court also distinguished the SEC's ALJs from the Special Trial Judges of the Tax Court, whom this Court found to be executive officers in *Freytag v. Commissioner*, 501 U.S. 868 (1991). The appeals court reasoned that, unlike the SEC's ALJs, "the Tax Court in *Freytag* was required to defer to the special trial judge's factual and credibility findings unless they were clearly erroneous." Pet. App. 19a. Because the Special Trial Judges could "issue final decisions in at least some cases" they could "exercise the judicial power of the United States." *Id.* at 11a, 12a.

Concluding that ample evidence supported the SEC's finding that petitioners violated the Investment Adviser's Act, Pet. App. 21a-32a, the appeals court went on to hold that the SEC had not abused its discretion in imposing sanctions and monetary penalties on petitioners. *Id.* at 33a-36a.

Petitioners sought rehearing en banc. Pet. App. 244a-246a. The appeals court first granted rehearing, directed additional briefing, and vacated

the panel's judgment. In June 2017, however, the en banc court issued a per curiam ruling denying the petition for review "by an equally divided court." *Id.* at 1a-2a.

After the Solicitor General confessed error by conceding in its certiorari-stage brief that all SEC ALJs are "Officers" under the Appointments Clause, the SEC entered an order claiming to "put to rest" any constitutional defect. *See* Order, *In re Pending Administrative Proceedings*, Securities Act Release No. 10,440, at 1 (Nov. 30, 2017) (Ratification Order). The SEC purported to "ratify" the prior appointment of its five ALJs and directed them to "[r]econsider the record" in any open proceeding to decide "whether to ratify or revise in any respect all prior actions taken." *Id.* at 1-2.

SUMMARY OF ARGUMENT

By prescribing the exclusive means for appointing any "Officer of the United States," the Appointments Clause safeguards the Constitution's "structural integrity" by ensuring that those who wield significant federal authority are "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 878, 884. But political accountability is a dead letter if, as here, agency decision-makers do not have to answer for their policy decisions to one of the elected branches.

The ALJ who presided over petitioners' hearings in this case was an "inferior Officer" within the meaning of Article 2, Section 2, Clause 2 of the Constitution. That provision requires that all "inferior Officers" be appointed by the President, the

"Courts of Law," or the "Heads of Departments." Petitioners' ALJ was not so appointed. That violation of the Appointments Clause renders unconstitutional the proceedings below and the resulting order against petitioners.

As this Court recognized in *Freytag*, Appointments Clause violations go "to the validity" of the underlying proceedings. 501 U.S. at 879. As its ratification order makes clear, however, the SEC deems any structural constitutional defect in its ALJ proceedings to be of no consequence. But this Court's precedents bar any effort to salvage *ultra vires* administrative hearings conducted by officials in violation of the Appointments Clause. Indeed, regardless of the name that government officials have previously used when trying to salvage proceedings conducted by improperly appointed officials—whether the *de facto* officer doctrine, harmless error analysis, or ratification—the Court has consistently rejected such efforts when (as here) the defendant has raised a timely objection to the qualifications of the presiding officer.

WLF urges the Court to address the propriety of the SEC's attempted "ratification" now, rather than allow the issue to drag on for several more years—particularly because this precise issue is almost certain to return to the Court. As detailed below, the Court should rule that any enforcement proceedings conducted before an improperly appointed ALJ are a nullity, and so the SEC must start from scratch if it chooses to renew enforcement efforts against the targets of those proceedings. Otherwise, if such clear constitutional violations can be so easily "ratified," little will be left of the

Constitution's "structural integrity" and the political accountability it guarantees.

ARGUMENT

I. BECAUSE THE SEC'S ALJS ARE OFFICERS OF THE UNITED STATES, THEIR APPOINTMENT BY THE CHIEF ALJ VIOLATES THE APPOINTMENTS CLAUSE

The Constitution divides federal power among three co-equal branches: Legislative, Executive, and Judicial. The Framers implemented this tripartite separation of powers to "provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). To help accomplish that important aim, the Constitution vests the Executive power in the President, who must "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

Of course, the "President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)). Article II of the U.S. Constitution carefully circumscribes the category of individuals authorized to exercise Executive Branch power. In particular, the Appointments Clause prescribes how such "Officers" of the United States must be chosen and appointed:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls,

> Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, Cl. 2. As shown below, because the SEC's ALJs are "inferior Officers" under the Appointments Clause, their appointment by the Chief ALJ is unconstitutional. Because that defect "goes to the validity of the ... proceeding," *Freytag*, 501 U.S. at 879, this Court should vacate the SEC's final opinion and order below.

A. The SEC's ALJs Are Inferior Officers of the United States

By its own terms, the Appointments Clause provides that "Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2; *Buckley*, 424 U.S. at 132. Here it is undisputed that the appointment of the ALJ who presided in petitioners' case did not satisfy that constitutional command. Instead, petitioners' ALJ was selected by the SEC's Chief ALJ, subject to approval by the SEC's Office of Human Resources. Pet. App. 295a-297a; 17 C.F.R. § 201.110.

Where, as here, an individual "exercise[s] significant authority pursuant to the laws of the United States," that person "is an Officer of the United States." *Freytag*, 501 U.S. at 881. In *Freytag v. Commissioner*, this Court concluded that the Special Trial Judges (STJs) appointed by the Chief Judge of the Tax Court were inferior officers whose appointment violated the Appointments Clause. In so holding, the Court focused on (1) the fact that the office of the STJ was "established by Law ... and the duties, salary, and means of appointment for that office [were] specified by statute," and (2) that the STJs performed "more than ministerial tasks." 501 U.S. at 881-82. The SEC's ALJs resemble STJs in all those respects.

As was true of the STJs in *Freytag*, the office of an SEC ALJ is established by law. An SEC ALJs' duties, salary, and means of appointment are all determined by statute. *See, e.g.*, 5 U.S.C. § 556 (establishing powers and duties of ALJs presiding over administrative hearings); 5 U.S.C. § 557(b) (providing that an ALJ must "initially decide the case"); 5 U.S.C. § 3105 ("Each agency shall appoint as many [ALJs] as are necessary for the proceedings required to be conducted in accordance with sections 556 and 557 of this title."); 5 U.S.C. § 5372 (establishing the salary of ALJs). And the Securities Exchange Act of 1934 itself confirms the ALJ's broad authority. *See* 15 U.S.C. § 78d-1(a) (providing that the SEC "shall have the authority to delegate ... any of its functions to ... an administrative law judge ... including functions with respect to hearing ... any ... matter").

Entrusted with broad powers, the SEC's ALJs perform more than "ministerial tasks." Like the STJs in *Freytag*, the SEC's ALJs regularly take testimony, conduct trials, make evidentiary rulings, and impose sanctions. *See, e.g.*, 17 C.F.R. § 200.14 (establishing an ALJ's broad powers in proceedings instituted by the SEC); 17 C.F.R. § 200.30-9 (describing the delegation of significant authority from the SEC to each ALJ "hearing officer"); 17 C.F.R. § 200.30-10 (describing the delegation of authority from the SEC to the Chief ALJ); 17 C.F.R. § 200.111 (establishing the authority of a "hearing officer"); 17 C.F.R. § 201.180 (authorizing the ALJ to impose sanctions for contemptuous conduct). To be sure, the fact that the SEC authorizes its ALJs to "[r]egulate the course of a hearing," 17 C.F.R. § 200.14, confirms that they exercise "significant discretion" in "carrying out the[ir] important functions." *Freytag*, 501 U.S. at 882.

The SEC's ALJs resemble *Freytag*'s STJs in another important respect: both may render final decisions. As an alternative holding, *Freytag* noted that STJs were inferior officers because they could render decisions of the Tax Court in some classes of cases, subject to whatever review the Tax Court may care to provide. 501 U.S. at 882. ALJs may also render final decisions of the SEC in some cases. *See* 5 U.S.C. § 557(b) (explaining that when an ALJ "makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by the rule"). Ultimately, if the SEC opts not to review a decision of the ALJ, "then the action of [the ALJ]

... shall, for all purposes, including appeal or review thereof, be deemed an action of the Commission." 15 U.S.C. § 78d-1(c).

Although *Freytag* did not address whether ALJs constitute inferior officers of the United States, Justice Scalia answered that question in his concurring opinion:

> Today, the Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication under the Administrative Procedure Act ("APA"), *see* 5 U.S.C. §§ 554, 3105. They are all *executive* officers.

501 U.S. at 910 (Scalia, J., concurring in part and concurring in judgment, joined by O'Connor, Kennedy, & Souter, JJ.) (emphasis in original). Justice Breyer has since embraced that same view in his dissent in *Free Enterprise Fund. v. PCAOB*, 561 U.S. 477, 542 (2010) (Breyer, J., dissenting, joined by Stevens, Ginsburg, & Sotomayor, JJ.) ("As Justice Scalia has observed, 'administrative law judges (ALJs) are all executive officers.'").

Like the STJs held to be inferior officers in *Freytag*, the SEC's ALJs all occupy an office that is "established by law," exercise "significant authority" under federal law, and perform more than ministerial tasks in both overseeing and adjudicating myriad administrative proceedings. They also may render final decisions. For these

reasons, the SEC's ALJs are executive officers for Article II purposes.

B. The SEC's ALJs Are *Not* Mere Employees

Insisting that the SEC's ALJs are mere low-level "employees" and not "Officers of the United States," the panel below concluded that holding a hearing before an SEC ALJ is both constitutional and proper. Neither contention is true.

In reaching its conclusion, the appeals court failed even to recite the applicable statutory language that serves as the basis for the SEC's hearing below, § 12 of the Investment Advisers Act. That provision, entitled "Hearings," expressly states that "Hearings ... may be held before the Commission, any member or members thereof, or *any officer or officers of the Commission designated by it* ...." 15 U.S.C. § 80b-12 (emphasis added). Nor is the Investment Advisers Act alone in requiring that hearings be conducted either by the SEC or by "any other officer or officers of the Commission designated by it." Every major statute the SEC enforces has substantially the same language. *See* 15 U.S.C. § 78v (Securities Exchange Act of 1934); 15 U.S.C. § 77u (Securities Act of 1933); 15 U.S.C. § 80a-40 (Investment Company Act of 1940).

On its face, this statutory language confirms that only someone who is an officer of the SEC may hold hearings. And the fact that a hearing officer is statutorily interchangeable with either the SEC itself or a commissioner of the SEC confirms that a hearing officer is someone who enjoys the broad

discretion of an executive officer—one who is empowered to "exercise significant authority pursuant to the laws of the United States." *Free Enter. Fund*, 561 U.S. at 486 (citing *Buckley*, 424 U.S. at 126).

The statutory language is instructive because, until recently, the SEC has interpreted it in a way that allows the SEC's ALJs to exercise significant investigatory powers as "officers" of the SEC—*not* "employees." For example, the SEC's own enforcement manual designates as "senior officers" those who may "administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of documents and other materials" during formal investigative proceedings. *See* SEC Office of Chief Counsel, Enforcement Manual § 2.3.4 (June 4, 2015).

Nonetheless, the D.C. Circuit concluded that SEC ALJs are employees under its prior holding in *Landry v. FDIC*, which held that the FDIC's ALJs were not executive officers. But in reaching that conclusion, the panel misconstrued its own circuit precedent. As the Solicitor General explained in opposing Landry's petition for certiorari, *Landry* "did not purport to establish any categorical rule that administrative judges are employees rather than 'inferior officers.'" U.S. Br. Opposing Cert., *Landry v. FDIC*, No. 99-1916, 2000 WL 34013905, at *7 (U.S. Aug. 28, 2000). Rather, *Landry*'s holding was narrowly limited to evaluating the particular role and duties of only the FDIC's ALJs.

Nor should this Court accept the appeals court's mischaracterization of *Freytag* as somehow

turning on whether an STJ could render a final decision of the Tax Court. On the contrary, as Judge Randolph emphasized in his concurrence in *Landry*, *Freytag* designated the potential finality of an STJ's decision as another, *alternative* basis for its holding that STJs were officers. *See* 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in judgment) (explaining that *Freytag* "clearly designated [an STJ's power to render a final decision] as an alternative holding" to the "conclusion it had reached in the preceding paragraphs—namely ... [STJs] are nevertheless inferior officers of the United States"). In any event, as shown above, *un*like the FDIC's ALJs at issue in *Landry*, the SEC's ALJs may (and often do) render final decisions of the SEC.

Simply put, this Court has *never* held that an individual with federal adjudicative authority is a mere "employee." Instead, the Court has consistently found federal officials with quasi-judicial functions to be "Officers." *See, e.g.*, *Edmond v. United States*, 520 U.S. 651 (1997) (judges of the Coast Guard Court of Criminal Appeals); *Weiss v. United States*, 510 U.S. 163 (1994) (military judges); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) (United States commissioners), *abrogated on other grounds as stated in Arizona v. Gant*, 556 U.S. 332 (2009).

The SEC's discretion to review the decisions of its ALJs does not change the fact that ALJs are inferior constitutional officers. As the governing statutes and regulations make clear, the SEC's ALJs carry out "important functions," *Freytag*, 501 U.S. at 882, and "exercis[e] significant authority pursuant to

the laws of the United States," *Buckley*, 424 U.S. at 126. Thus, their exercise of authority outside the strictures of the Appointments Clause is *ultra vires*.

II. THE COURT SHOULD ADOPT A REMEDY COMMENSURATE WITH THE GRAVITY OF THE CONSTITUTIONAL VIOLATION

Likely in anticipation of defeat here, the SEC has taken steps to minimize the impact of that defeat on past and present enforcement proceedings still subject to judicial review. In its November 30, 2017 Ratification Order, the SEC sought "[t]o put to rest any claim" that its administrative proceedings were being conducted in violation of the Appointments Clause by

> (1) purporting to "ratif[y] the agency's prior appointment" of the agency's Chief ALJ and its four other ALJs;[2]
>
> (2) directing ALJs, in all pending proceedings in which no initial decision had issued, to "reconsider the record" and decide whether "to ratify or revise in any respect" all prior actions taken by an ALJ in the proceeding; and
>
> (3) remanding all matters still pending before the SEC in which an ALJ has issued an initial decision back to that

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[2] Those whose appointments the SEC purportedly ratified include Cameron Elliot, the ALJ who presided over the enforcement proceedings against petitioners.

> same ALJ to conduct a review of the sort outlined in No. 2 above.

Ratification Order at 1-2.

The Ratification Order did not address this or any of the 13 cases then pending in federal appeals court on petitions for review of SEC enforcement actions. One can reasonably assume, however, that if this Court determines that the SEC appointed its ALJs in violation of the Appointments Clause and lower courts remand those 13 cases back to the agency, the SEC is likely to respond by extending its Ratification Order to all of those cases. Above all, the Ratification Order is reasonably read as a blueprint for how the SEC intends to deal with every adversary proceeding conducted by an unconstitutionally appointed officer.

WLF respectfully suggests that this Court's case law bars any such effort to salvage administrative hearings conducted by officials appointed in violation of the Appointments Clause. WLF urges the Court to address the propriety of the SEC's likely salvage operation now, rather than allow the issue to drag on for several more years—particularly because this precise issue is almost certain to return to the Court. Regardless of the name that government officials have previously used when upholding proceedings conducted by improperly appointed officials—whether the *de facto* officer doctrine, harmless error analysis, or ratification—the Court has uniformly rejected such efforts when (as here) the defendant has raised a timely objection to the qualifications of the presiding officer. The Court should rule that any enforcement

proceedings conducted before an improperly appointed ALJ are a nullity, and that the SEC must start from scratch if it chooses to renew enforcement efforts against the targets of those proceedings.

A. This Court Has Uniformly Rejected Efforts to Salvage Actions Undertaken by Improperly Appointed Officials

During a nine-day hearing conducted as part of the enforcement action against petitioners, ALJ Elliot presided over witness testimony and made rulings not only on the admissibility of evidence and objections to testimony but on the merits of the SEC's charges. Pet. App. 115a-237a. The SEC's Ratification Order makes clear that the SEC wishes to avoid having to conduct new hearings if this Court determines that it improperly appointed its ALJs. It seeks instead to retroactively validate those hearings, provided only that a properly appointed ALJ has reviewed the administrative record and has determined that the proceedings were conducted properly. But this Court has consistently rejected such salvage operations, concluding that endorsing them would undermine compliance with constitutional norms and discourage litigants from even raising meritorious objections to the qualifications of the presiding officer.

Thus, in *Ryder v. United States*, 515 U.S. 177 (1995), the Court unanimously overturned the defendant's conviction by a court-martial on drug charges because one of the courts that reviewed that conviction—the Coast Guard Court of Military Review—included two judges appointed in violation

of the Appointments Clause. The United States conceded the constitutional violation, and the Court rejected each of the Government's many arguments for why the conviction should stand despite that violation. The Court held that application of the *de facto* officer doctrine was limited to a defense against *collateral* attacks on the judgment; it noted that Ryder had challenged the composition of the Coast Guard Court of Military Review "while his case was pending before that Court on direct review." 515 U.S. at 182.

In rejecting the Government's no-harm-no-foul argument, the Court stressed the importance of Article II's requirement that the functions of "Officers" of the United States be reserved for those properly appointed under the Appointments Clause:

> [Ryder's] claim is based on the Appointments Clause of Article II of the Constitution—a claim that there has been a trespass upon the executive power of appointment, rather than a misapplication of a statute. ... We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the case. ... Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments.

Id. at 182-83 (citations omitted). Nor did the Court adopt the Government's suggestion to excuse the

violation because the conviction was later ratified by another (and properly constituted) appellate court—the Court of Military Review, which upheld the conviction in every respect and found the violation of the Appointments Clause to be harmless error. *Id.* at 186-88.[3]

The Court relied on *Ryder* in *Nguyen v. United States*, 539 U.S. 69 (2003), to overturn the judgment of a three-judge Ninth Circuit panel, one of whose members was not an Article III judge. While stating that the *de facto* officer doctrine is sometimes a basis for overlooking "merely technical defects" in the qualifications of a presiding officer, 539 U.S. at 77, the Court held that permitting a non-Article III judge to sit on an Article III court was no mere technical violation: "Congress' decision to preserve the Article III character of the courts of appeals is more than a trivial concern ... and is entitled to respect." *Id.* at 80. The Court rejected the Government's argument that the judgment should be upheld because the proceedings were fair and the votes of the panel's two Article III judges were enough to ratify the judgment. *Id.* at 80-83. Instead, the Court ordered a "fresh consideration" of the appeal by "a properly constituted panel." *Id.* at 83.[4]

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[3] The Court recognized that the *de facto* officer doctrine may be relevant when the voiding of all *ultra vires* decisions by an unauthorized officer might lead to a massive disruption of government operations. But the Court held that such concerns did not arise in Ryder's case given the limited number of cases on direct review (between 7 and 10) implicated by the Court's decision. *Id.* at 185-86.

[4] The D.C. Circuit recently relied on *Nguyen* to hold that the actions of the Acting General Counsel of the NLRB

Similarly, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), the Court concluded that federal court judgments[5] could not stand if issued by judges not appointed in accordance with Article III of the Constitution. The Government argued that even if the challenged judges were serving improperly in Article III federal courts, the judgments should survive under the *de facto* officer doctrine.

Writing for the Court, Justice Harlan rejected that contention. 370 U.S. at 535-37. While acknowledging that the *de facto* officer doctrine might "immunize from examination" a "defect in statutory authorization for a particular intracircuit assignment" of a federal judge, the Court held that the doctrine could not save proceedings presided over by an official appointed in violation of constitutional norms:

> The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. ... It should be

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(whose appointment violated the Appointments Clause and the Federal Vacancies Reform Act) could not be salvaged based on either harmless error or the *de facto* officer doctrine. *SW General, Inc. v. NLRB*, 796 F.3d 67, 79-82 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017). The appeals court found that *Nguyen* precluded any application of the *de facto* officer doctrine to an Appointments Clause defect. *Id.* at 81.

[5] One of the judgments (from the Second Circuit) was by a three-judge panel that included a judge from the Court of Claims sitting by designation. The other judgment (from the U.S. District Court for the District of Columbia) was by a retired judge of the Court of Customs and Patent Appeals.

> examinable *at least on direct review*, where its consideration encounters none of the objections associated with the principle of res judicata, that there be an end to litigation.

Id. at 536 (emphasis added).[6] Significantly, the Court has never given effect—in any guise—to an adjudicatory action by an unconstitutional official.

B. Merely Assigning a New Name to Efforts to Salvage Prior Proceedings Is Insufficient to Distinguish *Ryder* and *Nguyen*

Perhaps recognizing that the Government has fared poorly before this Court when it has tried to invoke the *de facto* officer doctrine and harmless error analysis to rescue *ultra vires* proceedings before improperly appointed officials, the SEC has resorted to a change in nomenclature. Its Ratification Order asserts that newly minted ALJs may "ratify" proceedings conducted (it apparently fears) in violation of the Appointments Clause. That change in wording, however, cannot permit the SEC to salvage federal adjudicatory proceedings by unconstitutionally appointed officials. An agency is, of course, permitted to "ratify" past actions in the sense that it may renew its enforcement actions in a timely manner. But this Court has *never* upheld Executive-Branch ratification of administrative actions that

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[6] The Court ultimately concluded that the two judges sitting by designation were, in fact, Article III judges, and so it affirmed the judgments below solely on that basis. *Id.* at 584.

were *ultra vires* when undertaken.

The Government has sought such ratification in this Court only once, and the Court overwhelmingly rejected that effort. *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994). In that case, the Government was not even seeking to ratify an entire administrative proceeding; it merely sought to ratify the filing of a certiorari petition by a federal agency (the Federal Election Commission) that lacked the independent litigating authority to file such a petition on its own.

The Court explained that any effort to ratify prior unauthorized government action is limited by the longstanding agency-law principle that "the party ratifying should be able not merely to do the act ratified at the time it was done, but also at the time the ratification was made." *Id.* at 98 (emphasis omitted) (quoting *Cook v. Tullis*, 85 U.S. 332, 338 (1873)). Because the Government's purported ratification did not meet that standard, the Court dismissed the certiorari petition. *Id.* at 99.

NRA Political Victory Fund is fatal to any SEC effort to distinguish *Ryder* and *Nguyen* by characterizing its attempt to excuse its unconstitutional ALJ proceedings as a "ratification" of those proceedings. If petitioners prevail on the merits of their Appointments Clause challenge, it will be uncontested that the SEC's five ALJs lacked authority "to do the act ratified at the time the act was done." Those ALJs received that authority no earlier than November 30, 2017, when the SEC

issued its Ratification Order.[7] Indeed, the SEC lacked *any* ALJs who were constitutionally authorized to conduct enforcement proceedings against petitioners at the time ALJ Elliot conducted his nine-day hearing in 2013. Without that authority, newly appointed ALJs are barred by *NRA Political Victory Fund* from ratifying proceedings conducted by improperly appointed ALJs.[8]

In several cases, the Court has permitted *Congress* to ratify Executive Branch acts undertaken by officials unauthorized to act, but only if Congress *was* so authorized to act at the time of the initial act. *See, e.g., United States v. Heinszen*, 206 U.S. 370 (1907) (holding that although a Presidential order imposing a duty on Philippines-bound goods was unauthorized when first issued, legislation enacted in 1902 by Congress—*which could have imposed the same duty via legislation at the time of the initial Presidential order*—served to ratify the order). But in none of those cases did the Court uphold

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[7] Petitioners mount a strong argument that even the Ratification Order does not satisfy the Appointments Clause's requirements for appointing the five ALJs as "Officers" of the United States. Pet. Br. 50-51.

[8] This Court's ratification rule is consistent with the Restatement (Third) of Agency § 4.05 (2006): "A ratification of a transaction is not effective unless it *precedes* the occurrence of circumstances that would cause the ratification to have adverse and inequitable effects on the rights of third parties" (emphasis added). As third parties to any purported ratification, petitioners will suffer serious adverse effects if the SEC may ratify its 2013 proceedings by an unconstitutional official: they will be subject to a ruinous order that directly resulted from *ultra vires* acts.

ratification by *the Executive Branch*, and none involved ratification of adjudicative proceedings before an administrative agency or court.[9] Indeed, *Heinszen* explicitly limited ratification to events *preceding* a substantive court ruling in legal proceedings arising out of the prior Executive Branch action. *See* 206 U.S. at 387-88.

C. The Court Should Reach the Ratification Issue Now, Rather than Remanding the Case and waiting Its Inevitable Return to This Court

Petitioners have shown that the SEC has acted unconstitutionally by seeking to impose sanctions on them based on administrative proceedings conducted by an official who was not (but should have been) appointed consistent with the Appointments Clause. Petitioners are therefore entitled to a remedy that is commensurate with the gravity of that constitutional violation. Merely vacating the SEC's action and directing the agency to begin anew is not an adequate remedy. By issuing its Ratification Order, the SEC has made clear that—if this matter is merely vacated and remanded—it intends to send this matter back to

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[9] Congress has also expressed its disapproval of ratification of agency decisions by Executive Branch officials through the Federal Vacancy Reform Act of 1998 (FVRA). The FVRA provides that, with rare exceptions, actions taken by officials improperly appointed to federal vacancies "shall have no force and effect" and "may not be ratified." 5 U.S.C. § 3348(d).

ALJ Elliot to permit him to salvage the prior proceedings by declaring them "ratified."[10] As explained above, however, any such effort to salvage the prior proceedings is constitutionally impermissible.

To forestall the SEC's anticipated conduct that would compound the agency's constitutional violations, an appropriate remedy is to (1) vacate all SEC actions undertaken against petitioners to date (including the Commission's decision to refer charges to a hearing before an unauthorized official);[11] and (2) direct the agency that if it wishes to proceed against petitioners, it must file new, timely charges. Anything less would render petitioner's victory Pyrrhic and make it highly likely that the case will

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[10] WLF notes that the consistent pattern of the SEC's ALJs, in the wake of the November 30, 2017 Ratification Order has been to declare that they are now duly appointed Officers (without conceding any defect in their prior status) and that they may ratify their own prior rulings and proceedings in toto. *See, e.g., In the Matter of David Pruitt, CPA*, Admin. Proceeding File No. 3-17950, Order Denying Motion for Stay (February 15, 2018).

[11] The vacated actions should include not only all proceedings before ALJ Elliot but also the Commission's September 5, 2012 order instituting proceedings against petitioners. That order suffers from the same constitutional defect as the later proceedings before ALJ Elliot because it explicitly directed that proceedings be conducted before an official that the Commission knew was not appointed consistent with the Appointments Clause. *See* September 5, 2012 Order at 10 ("It is ordered that a public hearing for the purpose of taking evidence on the questions set forth in Section III shall be convened ... before an Administrative Law Judge to be designated by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.").

return to this Court in several years.

A remedy of that nature is particularly warranted because the initial petition for review from any "ratified" SEC enforcement order would be to the D.C. Circuit, and that Court has issued several problematic decisions that have mistakenly adopted a doctrine that affords federal agencies broad authority to ratify their prior *ultra vires* actions. So without a meaningful remedy, petitioners will likely be forced to return to this Court for relief from the SEC's anticipated ratification decision.

The D.C. Circuit recognized the right of federal agencies to ratify prior, *ultra vires* actions in the immediate aftermath of its decision in *NRA Political Victory Fund*, which held that having two congressional officers serve as members of the FEC violated the Constitution and required the invalidation of actions taken by that improperly constituted body. *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dism'd*, 513 U.S. 88 (1994). The reconstituted FEC then voted to ratify the "old" FEC's decision to file a civil enforcement action against Legi-Tech, Inc., a company that marketed computer database services. The D.C. Circuit upheld the FEC's ratification decision without even citing, let alone trying to distinguish, this Court's *NRA Political Victory Fund* decision (which had rejected the Government's ratification efforts and dismissed as untimely the FEC's petition for review of the D.C. Circuit's decision). *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996).

Legi-Tech's "ratification" was limited to an

initial FEC decision to file a federal-court lawsuit, not (as will likely be the case here) ratification of an entire *ultra vires* administrative proceeding. But a later D.C. Circuit decision expanded *Legi-Tech* and held that the appeals court's ratification doctrine does, indeed, apply that broadly. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015). In *Intercollegiate*, the appeals court held: (1) the composition of the Copyright Royalty Board, a federal agency that determines royalty rates for webcasting, was unconstitutional (because members were appointed in violation of the Appointments Clause); (2) the royalty rates established by the "old" board were therefore invalid; but (3) a reconstituted board (whose members were constitutionally appointed) could "ratify" the royalty-rate decision of the "old" board based on the written record compiled by the "old" board, without conducting a new hearing. 796 F.3d at 118-121. The Court deemed it irrelevant that, in setting royalty rates, the board was "exercis[ing] judicial authority in an adversarial proceeding" and yet was relying on a paper record compiled by an administrative body unauthorized to act. *Id.* at 119.

Intercollegiate found it appropriate to impose at least some constraints on the authority of an agency to "ratify" the *ultra vires* actions of an earlier entity. The appeals court held that the ratifier's reconsideration must entail something more than a mere rubber-stamp of the previous actions: it limited ratification to situations in which "a properly appointed official has the power to conduct an independent evaluation of the merits *and does so*." *Id.* at 117 (emphasis added).

But the D.C. Circuit has since abandoned even that modest check on ratification authority. In *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017), the appeals court upheld an NLRB Regional Director's ratification of his own prior, invalid decision to begin and prosecute Unfair Labor Practice (ULP) proceedings against the petitioner.[12] The court declined to examine the petitioner's claim that the Regional Director had not carefully considered the whole record before ratifying his decision to prosecute ULP claims against the petitioner, stating that "even if the subsequent review was nothing more than a rubberstamp, it resolved any Appointment Clause deficiencies." *Id.* at 372 (citations omitted).

As shown above, the D.C. Circuit's entire line of "ratification" decisions misreads this Court's case law. The ratification endorsed by the D.C. Circuit conflicts with this Court's *NRA Political Victory Fund* decision and is indistinguishable from the *de facto* officer doctrine roundly rejected by *Ryder* and *Nguyen*. In *Ryder*, the Court rejected the Government's argument that the judgment of the Coast Guard Court of Military Review, although rendered invalid because two of the court's five members were appointed in violation of the Appointments Clause, could be ratified by the properly constituted Court of Military Appeals (which held that the error of the lower appeals court was harmless). *Ryder*, 515 U.S. at 186-88. In

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[12] All parties agreed that, at the time of the initial decision, the Regional Director's appointment had not complied with the Appointments Clause.

Nguyen, the Court rejected arguments that the presence of two validly appointed Article III judges on the Ninth Circuit panel was enough to overcome the taint created by the improper third panel member. *Nguyen*, 539 U.S. at 83-84.

A principal concern animating *Ryder*—that overlooking the Appointments Clause in that case would create an inappropriate "disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments," 515 U.S. at 183—is equally applicable to the SEC's efforts to ratify proceedings before unconstitutionally appointed ALJs. Moreover, as in *Ryder* and *Nguyen*, the Court need not worry that a decision preventing ratification of the SEC's *ultra vires* proceedings would cause administrative chaos within the Government; the number of SEC enforcement actions that are on direct review—and thus potentially affected by a no-ratification decision—is quite small.

Finally, WLF shares petitioners' concern over the unseemliness of returning remanded proceedings to the same official who (as an unauthorized ALJ) ruled against the defendant and imposed sanctions. Even if the ALJ, following confirmation of his status as an Officer of the United States, were obliged to conduct brand new proceedings, human nature suggests that any such ALJ would be sorely tempted to conclude that his original, constitutionally unauthorized handling of the proceedings was eminently fair and to issue the very same rulings he issued in the initial proceedings. For these reasons, WLF respectfully suggests that the Court's remedy include an order directing that any renewed

proceedings must be conducted by someone other than ALJ Elliot.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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